

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT TOBARRO.

Civil No. 10cv1121-JM (BGS)

V

Petitioner.

STATE OF CALIFORNIA.

## Respondent.

## **ORDER DISMISSING CASE WITHOUT PREJUDICE**

Petitioner, an Arizona prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging a California conviction. This action is subject to dismissal without prejudice because Petitioner has failed to satisfy the filing fee requirement, failed to use a proper form, failed to name a proper respondent, failed to state a cognizable federal claim and failed to allege exhaustion of state judicial remedies. Petitioner will be provided with an opportunity to amend his Petition to cure these pleading deficiencies.

## FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has neither paid the filing fee nor filed a motion to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than July 26, 2010**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

## **FAILURE TO USE PROPER FORM**

2        Additionally, a Petition for a Writ of Habeas Corpus must be submitted in accordance with the  
3 Local Rules of the United States District Court for the Southern District of California. See Rule 2(d),  
4 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon  
5 a court-approved form and in accordance with the instructions approved by the Court. Id.; S. D. CAL.  
6 CIVLR HC.2(b). Presently, Petitioner has submitted an application for writ of habeas corpus on a non-  
7 approved form. Petitioner will be provided with a blank court-approved form along with a copy of this  
8 Order.

## **FAILURE TO NAME A PROPER RESPONDENT**

10       Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal  
11 habeas, a state prisoner must name the state officer having custody of him as the respondent. Ortiz-  
12 Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254).  
13 “Typically, that person is the warden of the facility in which the petitioner is incarcerated.” Id. Federal  
14 courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. See id.

15 The warden is the typical respondent. However, “the rules following section 2254 do not specify  
16 the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in  
17 which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” Id.  
18 (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due  
19 to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official  
20 custody of the petitioner (for example, the warden of the prison).’” Id. (quoting Rule 2, 28 U.S.C. foll.  
21 § 2254 advisory committee’s note).

22 Here, Petitioner has incorrectly named “State of California,” as Respondent. A long-standing  
23 rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against the State  
24 under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the] custodian  
25 [of the petitioner] must be the respondent.” Ashley v. Washington, 394 F.2d 125, 126 (9th Cir. 1968).  
26 This requirement exists because a writ of habeas corpus acts upon the custodian of the state prisoner,  
27 the person who will produce “the body” if directed to do so by the Court. Ortiz-Sandoval, 81 F.3d at  
28 895.

## **FAILURE TO ALLEGGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies, a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

15       Nowhere in the Petition does Petitioner allege that he raised his claims in the California Supreme  
16 Court. If Petitioner has raised his claims in the California Supreme Court, he must so specify. The  
17 burden of proving that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d  
18 1103, 1104 (9th Cir. 1981).

19 The Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of  
20 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by  
21 a person in custody pursuant to the judgment of a State court. The limitation period shall run from the  
22 latest of:

27 (C) the date on which the constitutional right asserted was  
28 initially recognized by the Supreme Court, if the right has been newly

recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

## **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

Finally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannholt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” See 28 U.S.C. § 2254(a).

Here, Petitioner appears to contend that he was convicted of being drunk in public in San Diego and that he moved to Arizona before completing his sentence in a half-way house, and seeks to

1 invalidate any pending criminal charges or outstanding warrants in San Diego. (Pet. at 3.) In no way  
2 does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United  
3 States.” 28 U.S.C. § 2254.

4 Rule 4 of the Rules Governing Section 2254 cases provides for summary dismissal of a habeas  
5 petition “[i]f it plainly appears from the face of the petition and any attached exhibits that the petitioner  
6 is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain  
7 from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not  
8 alleged exhaustion of state court remedies and has not stated a cognizable claim.

9 **CONCLUSION**

10 Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner  
11 has failed to satisfy filing fee requirements, failed to name a proper respondent, failed to allege  
12 exhaustion of state judicial remedies and failed to state a cognizable federal claim. To have this case  
13 reopened, Petitioner must, no later than **July 26, 2010**, pay the \$5.00 filing fee or submit adequate proof  
14 of his inability to pay the fee, and file a First Amended Petition that cures the pleading deficiencies set  
15 forth above.

16 Further, Petitioner is advised that if he has not submitted a First Amended Petition stating a  
17 cognizable federal claim and alleging exhaustion of his state court remedies with regard to that claim  
18 before **July 26, 2010**, he will have to start over by filing a completely new habeas petition in this Court.  
19 See In re Turner, 101 F.3d 1323 (9th Cir. 1997). The Clerk of Court shall send a blank Southern District  
20 of California In Forma Pauperis Application and a blank Southern District of California amended  
21 petition form to Petitioner along with a copy of this Order.

22 **IT IS SO ORDERED.**

23 **DATED: June 7, 2010**

  
24  
25 **Hon. Jeffrey T. Miller**  
26  
27 **United States District Judge**

28 CC: ALL PARTIES